

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LVB-OGDEN MARKETING, LLC,

Plaintiff,

v.

SHARON G. BINGHAM,

Defendant,

BANK OF THE WEST,

Garnishee.

No. 2:18-CV-00786-TSZ

**PLAINTIFF'S RESPONSE TO
GARNISHEE BANK OF THE WEST
AND DEFENDANT'S MOTIONS FOR
RECONSIDERATION**

NOTE ON MOTION CALENDAR:
JANUARY 18, 2018

ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION**

2 The motions for reconsideration filed by garnishee Bank of the West (“BOTW”) and
 3 Defendant fall woefully short of meeting the exacting standard for reconsideration, and should be
 4 denied on that basis. Neither motion presents any new legal authority that has emerged since the
 5 Court’s decision. Neither motion presents any new evidence that could not have been presented at
 6 the time the motions were briefed. Instead, movants point to: (i) BOTW’s improper *in camera*
 7 submission, which it refused to provide to LVB, which it filed despite the Court’s order staying the
 8 submission, and which BOTW *never once referenced in its summary judgment papers*; and (ii) a
 9 few conclusory statements in declarations from BOTW employees and Henry Dean—which
 10 obviously could have been presented at the time of the motions if they were meaningful.

11 All of the “new” evidence pre-dates the original filings, and thus cannot be a basis for
 12 reconsideration. Accordingly, to prevail, movants would have to show that the Court committed
 13 *manifest error*—that is, “an error that is plain and indisputable, and that amounts to a complete
 14 disregard of the controlling law or the credible evidence in the record”—simply because it did not
 15 consider evidence that was not relied upon, and that LVB had never seen. The Court committed no
 16 such manifest error. The Court correctly held that “due process demands that this Court not rely on
 17 ex parte communications or evidence to decide contested motions in this case.” ECF 40 at 4.

18 Yet even if the Court could somehow consider the “new” evidence, it would not change the
 19 result, and BOTW’s answer would remain incomplete. *First*, none of the evidence disputes the
 20 simple facts that: (i) to claim that the accounts were exempt from garnishment as “active trust”
 21 funds, it was Defendant’s obligation to claim that exemption on *May 8, 2018*; (ii) Defendant did not
 22 do so; and therefore (iii) any such claim has been waived. BOTW still presents no authority for the
 23 proposition that it can assert exemptions on Defendant’s behalf, or that it can do so by simply
 24 omitting the accounts from its Answer—thereby short-circuiting the process of adjudicating them.
 25 *Second*, none of the evidence disputes that Defendant, at the very least, has a fully vested property
 26 right in the funds sitting in those accounts, meaning the accounts were required to be disclosed in

1 the Answer. **Third**, even if BOTW could justify an incomplete answer simply by pointing to the
 2 “incapability” language in the Wills (for all the reasons above, it cannot), neither the conclusory
 3 paragraph in the chart BOTW produced (ECF 43 at 90), nor the equally conclusory declarations,
 4 present evidence that Defendant actually is “incapable of managing to his or her own best interest
 5 and advantage the property to be distributed.” ECF 42 at 2. Generously, this “new” evidence can
 6 be simply summarized as: Defendant wishes to evade the judgments against her. Nothing in
 7 Washington law supports the notion that a desire to evade creditors renders one incapable of
 8 managing money, and neither party has met their burden of showing that it could.

9 BOTW made the strategic decision not to rely upon the *in camera* evidence on summary
 10 judgment, in the apparent hope that the Court would overlook BOTW’s clear misstatements of the
 11 record, deny LVB’s motion, and the evidence of its collusion with Defendant to evade creditors
 12 would never come to light. That is certainly no basis for reconsideration.

13 II. BACKGROUND

14 LVB summarized the history of this dispute in its summary judgment Statement of Facts.
 15 ECF 32 (Mot.) at 2-5. It reiterates here only the facts most salient to the pending motions:

16 On June 14, 2018, in response to LVB’s controversy, BOTW represented to the Court
 17 that it was willing to submit additional, purportedly “confidential” information concerning its
 18 exercise of discretion *in camera*. ECF 13 at 11 n.3. On August 14th, the Court accepted that offer
 19 and set an August 21st filing deadline. ECF 22 at 1. LVB sent an e-mail confirming that BOTW
 20 intended to share its submission with LVB, but **BOTW refused**. ECF 23-1. LVB was therefore
 21 forced to bring BOTW’s refusal to the Court’s attention. ECF 23.

22 On August 21st, the Court **stayed** its August 14th order, and invited briefing by August
 23 29th regarding the “legal basis for refusing to provide” the *in camera* evidence to LVB. *See* ECF
 24 24 at 1. On August 29th, BOTW and Defendant opposed production of the *in camera* evidence to
 25 LVB, while identifying no legal basis for that position. *See* ECF 26 at 5; ECF 27 at 5.

26 In the same August 14th Order, the Court also set a September 6th filing deadline for

1 “motions for summary judgment addressing whether a trial is necessary to resolve the issue of
 2 controversion currently before the Court.” ECF 22 at 1. BOTW, Defendant, and LVB all filed
 3 motions for summary judgment, as well as corresponding oppositions and replies. *See* ECF 29-39.
 4 Neither BOTW nor Defendant cited or otherwise referenced the *in camera* submission in their
 5 summary judgment papers; instead, they misrepresented to the Court that BOTW had
 6 “uncontrolled discretion” to withhold trust distributions and claimed that the reasons for exercising
 7 its discretion were irrelevant to these proceedings. *See* ECF 29 at 9-11; ECF 33 at 2; ECF 34 at 2-
 8 3, 5-7; ECF 36 at 3, 9; ECF 37 at 3-5; ECF 39 at 5.

9 In its November 21, 2018 Order, the Court agreed with LVB that (1) “due process demands
 10 that this Court not rely on ex parte communications or evidence to decide contested motions in this
 11 case,” (2) BOTW “has not presented any evidence regarding the exercise of that discretion,” (3)
 12 and, even still, BOTW “has misconstrued the applicable language in the trust documents.” ECF 40
 13 at 4, 8. Moreover, the Court identified specific misrepresentations by BOTW about the scope of
 14 its authority to withhold distributions from the Fisher Trusts, and cited evidence of collusion
 15 between BOTW and Defendant to conceal her assets from her creditors. *See id.* at 5-7. The Court
 16 ordered BOTW to amend its Answer to include “any accounts controlled by or in the possession of
 17 the Fisher Trusts for the benefit of Defendant” and “a list of any other assets that were distributed
 18 from the Fisher Trust accounts since the date the writ of garnishment was served.” *Id.* at 9.

19 **III. ARGUMENT**

20 **A. The Motions Fail to Establish Any Cognizable Basis for Reconsideration.**

21 “[A] motion for reconsideration should not be granted, absent highly unusual
 22 circumstances[.]” *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)
 23 (quoting *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). “Motions for
 24 reconsideration are disfavored” and courts will “deny such motions in the absence of a showing of
 25 a manifest error in the prior ruling or a showing of new facts or legal authority which could have
 26

1 been brought to its attention earlier with reasonable diligence.” LCR 7(h)(1).¹

2 Neither BOTW nor Defendant present any new legal authority. BOTW Mot. at 9, 11; Def.
3 Mot. at 4-5. Nor, as addressed in detail below, do they (i) present any new evidence that could not
4 have been submitted with the original papers; or (ii) demonstrate that the Court committed
5 manifest error—that is, that the Court committed “an error that is plain and indisputable, and that
6 amounts to a complete disregard of the controlling law or the credible evidence in the record.”
7 *Trade Assocs. Inc. v. Fusion Tech. Inc.*, 2011 WL 13195979, at *2 (W.D. Wash. May 4, 2011).

8 **1. None of the Evidence BOTW or Defendant Relies Upon Is New.**

9 Neither BOTW nor Defendant identifies any evidence that has emerged since the original
10 briefing. The evidence they both now rely upon is evidence that clearly could have been presented
11 to the Court during the course of that briefing, namely: (i) materials that BOTW previously
12 submitted *in camera*, and (ii) a few conclusory declarations from BOTW employees that
13 Defendant is “incapable of managing” the Fisher Trust assets “to her own best interest and
14 advantage” that clearly could have been presented before if they were credible. *See* BOTW Mot.
15 at 11-16; Thibedeau Decl. ¶¶ 10-11, Ex. A; Bucklin Decl. ¶¶ 3-5; Hobson Decl. ¶¶ 4-5. Defendant
16 also filed a declaration from Henry Dean to support her “new evidence” claim. *See* Dean Decl. ¶
17 2. However, all of the exhibits thereto are dated **February 2, 2016 or earlier** (nearly 3 years ago),
18 and all of the events described in the declaration occurred prior to the original briefing. *See id.*
19 The declarations from BOTW and Mr. Dean—which clearly could have been submitted
20 earlier—do not even purport to present newly discovered evidence, and accordingly cannot be a
21 basis for reconsideration. LCR 7(h)(1). Both BOTW and Defendant offer “no reason why the
22 [declarations] could not have been obtained” earlier and filed with their summary judgment papers.
23 *Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994); *Abbywho, Inc. v. Interscope Rec.*, 2008 WL
24 11406034, at *6 (C.D. Cal. Jan. 7, 2008).

25 ¹ *Hopkins v. Andaya*, 958 F. 2d 881, 887 n.5 (9th Cir. 1992) (“A defeated litigant cannot set aside a judgment because
26 he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the
court.”).

1 The same is true of the *in camera* materials—all of which predate October 23, 2017. They
 2 were in BOTW’s possession, and known about at the time of the original briefing, and thus are not
 3 evidence that was newly discovered since the time of the original briefing. *See* BOTW Mot. at 6-
 4 7.² All told, neither BOTW nor Defendant can rely on “new evidence” as a basis for
 5 reconsideration. “[T]he failure to file documents in an original motion or opposition does not turn
 6 the late filed documents into ‘newly discovered evidence.’” *School Dist. No. 1J, Multnomah*
 7 *County, Or. V. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

8 **2. BOTW’s Improper *In Camera* Submission Cannot Be A Basis For A** 9 **Finding of “Manifest Error” By The Court.**

10 Having failed to produce any new evidence, BOTW likewise fails to offer any legal basis
 11 on which the Court committed manifest error in not considering BOTW’s procedurally improper,
 12 and expressly rejected, *in camera* submission.³ This is true for at least five, independent reasons.

13 **First**, BOTW never once actually referred to its *in camera* submission in opposing LVB’s
 14 summary judgment motion, or in support of its own motion. *See* ECF 29, 34, 37. It never once
 15 directed the Court to those materials or referenced them in its summary judgment
 16 papers—presumably because it recognized that doing so was improper. *Id.* Instead, BOTW
 17 argued that the issue of whether BOTW exercised its discretion was not relevant to these
 18 proceedings. *See* ECF 29 at 8-12; ECF 34 at 2-4, 5-7; ECF 37 at 3-5. It simply adopted the

20 ² Defendant complains that she asked for the *in camera* evidence and was likewise denied. Def. Mot., ECF 48, at 2.
 21 This is of no moment given that (i) she actually *opposed* the release of the *in camera* evidence (ECF 27); and (ii)
 22 causally asking for the materials, accepting their refusal, and failing to compel production is not exercising sufficient
 23 due diligence to qualify as new material. *See Schlicht v. United States*, 2006 WL 229551, at *2 (D. Ariz. Jan. 30,
 2006) (“[D]ue diligence assumes at least some level of deductive reasoning in an active effort to discover evidence
 based on the knowledge and information already possessed by the litigants.”). Moreover, the issue presented by
 LVB’s motion is the completeness of BOTW’s answer, which is BOTW’s obligation to address, not Defendant’s.

24 ³ BOTW’s reconsideration motion is not even internally consistent on this point. In an attempt to argue a basis for
 25 reconsideration, it argues that failing to consider the *in camera* submission was “manifest error” and this evidence
 26 “should be dispositive to the Court’s ruling on all three summary judgment motions.” BOTW Mot., ECF 42, at 11.
 Yet it still suggests that this information is not relevant to these proceedings. *See id.* at 13, n.33 (noting that the Court
 considered this information to be only “potentially relevant” and restating its prior argument that only “the fact that the
 [Bank] had exercised discretion” is relevant).

1 strategy of vaguely contending that it had unbridled “discretion,” and hoping the Court would not
 2 notice that this was grossly misstating the documents. *Id.* The Court correctly rejected that
 3 strategy, and identified the many places in which BOTW and its declarants misrepresented the
 4 facts. *See* ECF 40 at 5-7. BOTW cannot now contend that it was “manifest error” for the Court
 5 not to consider *in camera* materials BOTW never referenced or relied upon in its papers. To the
 6 contrary, the Court was bound to adhere to Rule 56, which requires a non-movant who contends
 7 that “a fact cannot be or is genuinely disputed must support the assertion by . . . ***citing to***
 8 ***particular parts of materials in the record*** [.]” Fed. R. Civ. P. 56(c)(1)(A) (emphasis added).
 9 That BOTW did not even purport to rely upon the *in camera* materials is sufficient basis, in and of
 10 itself, for the Court to reject it as a basis for reconsideration.
 11

12 ***Second***, BOTW was clearly aware that the *in camera* material was not before the Court on
 13 summary judgment. The Court expressly ***stayed*** its ruling on August 21, 2018 after LVB informed
 14 the Court that BOTW was refusing to share its submission with LVB. ECF 24 at 1. There was
 15 absolutely no misunderstanding on LVB’s part about whether the Court should consider BOTW’s
 16 *in camera* evidence at summary judgment, as BOTW claims. *See* BOTW Mot. at 3, 8. Having
 17 received the Court’s August 21st Order, BOTW cannot credibly contend that it believed the Court
 18 would consider evidence LVB had never seen and grant summary judgment on that basis.⁴
 19

20 ***Third***, federal law is clear that summary judgment motions such as the ones here cannot be
 21 decided based on *in camera* submissions. Indeed, “[i]t is a hallmark of our adversary system that
 22 we safeguard party access to the evidence tendered in support of a requested court judgment. . . . It
 23 is therefore the firmly held main rule that a court may not dispose of the merits of a case on the
 24

25
 26 ⁴ BOTW even concedes in its motion that “[i]n hindsight, perhaps [BOTW] should have interpreted the Court’s August 21 Order staying the prior order differently.” Ebel Decl., ECF 44, ¶ 5.

basis of *ex parte*, *in camera* submissions.” *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (DC. Cir. 1986) (citing *In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981)). For this reason, “consideration of *in camera* submissions to determine the merits of litigation is allowable only when the submissions involve compelling national security concerns or the statute granting the cause of action specifically provides for *in camera* resolution.” *Vining v. Runyon*, 99 F.3d 1056, 1057-58 (11th Cir. 1996).⁵ BOTW cited nothing in its summary judgment papers to the contrary, nor here. It did not refer to the *in camera* evidence at all in its original papers, and cited no legal authority that the Court could have considered undisclosed *in camera* evidence.

Fourth, BOTW had no proper legal basis to lodge the materials *in camera* in the first place. They are not privileged, and BOTW has not even established that it would meet the basic standard for confidentially needed for a filing *under seal*—which would have permitted LVB to review it. *See* LCR 5(g); *see also Williams v. Foster*, 2014 WL 7014496, at *1 (D. Nev. Dec. 11, 2014) (discussing *in camera* and under seal filings). Indeed, BOTW’s *in camera* submission, summarized in Appendix A, consists of:

- Three documents that were already before the Court: the Wills (ECF 43 at 9-45), an e-mail **confirming** that, as the Court suspected, BOTW has been colluding with Defendant to evade creditors (*id.* at 51-56), and a letter parroting Defendant’s legal arguments that was commissioned and partially written by Defendant’s counsel here (*id.* at 46-50).
- Two public records: Frances Graham’s death certificate (*id.* at 86) and a news article about the family (ECF 45 at 81-85).
- Defendant’s request to BOTW for distribution (*id.* at 57-80), which had already been produced by the SGB 2007 Trustee in the discovery proceeding.
- A heavily redacted chart containing one conclusory paragraph of analysis purporting to withhold funds on the basis that Defendant needs to evade creditors. (*id.* at 87-92).⁶

⁵ *See also Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995); *Lynn v. Regents of the Univ. of California*, 656 F.2d 1337, 1346 (9th Cir. 1981); *Ass’n for Reduction of Violence v. Hall*, 734 F.2d 63, 67 (1st Cir. 1984); *U.S. ex rel. Barber v. Pennsylvania*, 429 F.2d 518, 519-20 (3d Cir. 1970).

⁶ “The family used to be a very wealthy family, owning many businesses in the Seattle area, but due to a fraud committed upon them they are no[w] (sic) in a battle with creditors for their personal assets. (See attached judgments).”

Indeed, Defendant’s own counsel admits “there’s nothing there of Ms. Bingham’s information that is materially more private than what has been made public in other proceedings.” ECF 49 (Jacobowitz Decl.) ¶ 7. BOTW had no credible, legal basis to file materials *in camera* in the first place, and any “procedural irregularities” are of its own making. *Id.* They are certainly not a basis for a finding that the Court committed manifest error.

Finally, as discussed in detail below, the *in camera* evidence does not change the result here even if it had been presented. Each of these reasons would be sufficient, in and of itself, to reject the notion that the Court committed manifest error.

B. Even If They Were Presented And Considered, None of the Materials Submitted Now Warrants Reversal or Modification of the Court’s Order.

Even if the Court could consider the “new” material, none of the arguments made or materials submitted would warrant reversal or modification of the Court’s order.

1. BOTW Cannot Claim Exemptions on Defendant’s Behalf—They Were Waived When Defendant Failed to Timely Assert Them.

As a threshold matter, none of the evidence presented could disturb the reality that BOTW is improperly attempting to assert a waived exemption on Defendant’s behalf. Indeed, upon receiving the Court’s ruling on summary judgment in this proceeding, Defendant belatedly served and filed an exemption form asserting that the funds were exempt as trust funds. *See* ECF 52. The very statute cited in her filing—and *quoted in capital letters in the claim she served*—makes clear that any exemption claim must be filed “not later than twenty-eight days (four weeks) after the date on the writ.” RCW 6.27.160(1); ECF 52 at 2. Here, the writ papers were issued on **April 10, 2018** and served on BOTW and Defendant on April 12, 2018. ECF 2, 3, 5 ¶ 3. The writ papers identified the former Fisher Trust accounts at issue *by account number*. ECF 5-3.⁷ BOTW

⁷ The fact that the ACH exists establishes that BOTW knew at the time of its Answer that it was holding funds that would be distributed to Defendant—regardless of when that will take place. This makes BOTW’s claim that the Court “misapprehended how [automated clearing house] transfers work” of no relevance to the pending motions. BOTW Mot. at 4, 12. In any event, BOTW already raised this argument in the original briefing, meaning it is certainly irrelevant for purposes of a reconsideration motion. *Compare* ECF 37, at 5 n.2, *with* ECF 40, at 7-8. BOTW cannot

1 answered on May 7, 2018. ECF 4. Defendant's claim for exemption was due twenty-eight (28)
 2 days after the writ was issued, on May 8, 2018, but Defendant served no response on that date, let
 3 alone claimed an exemption. RCW 6.27.160(1); ECF 6 at 5-8; ECF 32 at 8. Defendant therefore
 4 failed to timely claim any exemption, and has waived any exemption claim that could have been
 5 made. See RCW 6.27.160(1). Nothing in the statute, or Washington law, permits a defendant to
 6 belatedly make this claim. See *U.S. Fidelity & Guar. Co. v. Hollenshead*, 51 Wash. 326, 328
 7 (1909) ("The right to claim property . . . specifically exempted by statute is a privilege, and will be
 8 waived unless asserted at the time and in the manner expressly or impliedly required by the law.").

9 Indeed, BOTW's *sole obligation* is to list in its Answer all of the accounts in which
 10 Defendant has an interest. See RCW 6.27.190. Any argument that *exemptions* apply (a separate
 11 question that is not before the Court), must be made by *Defendant*. See RCW 6.27.160(1) ("A
 12 *defendant* may claim exemptions from garnishment in the manner specified by the statute . . .")
 13 (emphasis added). She did not. BOTW cannot prevail on summary judgment by simply claiming
 14 that it short-circuited the exemption process altogether by not listing the accounts in its Answer in
 15 the first place. None of the "new" evidence presented in the reconsideration papers refutes this.

16 **2. Even If There Were a Timely Exemption Claim to Adjudicate, The New** 17 **Evidence Does Nothing To Justify BOTW's Incomplete Answer.**

18 The "new" evidence also fails to justify BOTW's incomplete answer. Nothing presented
 19 refutes the reality that Defendant is the "sole heir of the settlors" and thereby the sole beneficiary
 20 of the Fisher Trusts.⁸ Order, ECF 40, at 7. As a trust beneficiary, Defendant holds an equitable
 21 and beneficial ownership interest in the trusts' property. See *Milne v. U.S.*, 2000 WL 637315, at
 22 *2 (W.D. Wash. Feb. 24, 2000) (citing *Osteen v. Wineberg's Estate*, 30 Wash. App. 923, 932-33
 23 (1982)). She has a fully vested remainderman interest in the property.⁹ Washington law requires

24 now seek to "rehash arguments previously presented." *Hahn v. Strasser*, 2011 WL 13229073, at *1 (W.D. Wash.
 25 March 14, 2011); see also *Trade Assocs. Inc.*, 2011 WL 13195979, at *2.

26 ⁸ Indeed, even one of the Fisher Trust accounts includes "FBO Sharon Bingham" in its title. ECF 5-4 at 4.

⁹ See *Matter of Marriage of Galando*, 200 Wash. App. 1030, at *16 n.14 (2017) (providing that a spendthrift restraint does not protect against the beneficiary's creditors where the beneficiary is able to compel distribution of the trust

1 the garnishee to include in the answer any “property or effects belonging to the defendant” that are
 2 in the garnishee’s “possession or control.” RCW 6.27.060. Accordingly, the Fisher Trust accounts
 3 must be listed in BOTW’s answer regardless of whether BOTW or Defendants are claiming
 4 (belatedly) that they are exempt from garnishment.¹⁰ Again, if Defendant’s novel suggestion were
 5 the law, then there would be *no procedural mechanism* in a garnishment proceeding to challenge
 6 a claim that money sitting in an account is legitimately protected by a spendthrift trust.

7 But even if the exemption claim had not been waived (as above, it was), and BOTW could
 8 somehow short-circuit the exemption process by simply refusing to list accounts in its Answer (as
 9 above, it cannot), none of the “new material” lends any credible support to the merits of the
 10 exemption claim. As before, there is no question that—by the plain terms of the Wills—the
 11 settlors’ intent was for Defendant (their sole great-grand child) to receive all remaining trust assets
 12 after attaining the age of 45. *See* ECF 43 at 18, 35. The narrow carve-out BOTW relies upon can
 13 only apply on its face if Ms. Bingham is “incapable of managing to his or her own best interest and
 14 advantage the property to be distributed.” ECF 42 at 2. If the BOTW or Defendant wanted the
 15 Court to deviate from the plain meaning of that phrase, they were required to present evidence and
 16 authority for such an interpretation.¹¹ They did not and have not.¹²

17 Indeed, nothing in the record would support the conclusion that Defendant is
 18 “incapable”—that is, not capable at all—of receiving and handling money. Indeed, Defendant is

19 property); *In re Pettit*, 61 B.R. 341, 346 (Bankr.W.D. Wash.1986) (“Where a valid spendthrift trust exists, [] the
 20 portion of the trust which has accrued and is ready for distribution to the beneficiary is subject to seizure.”);
 Restatement (Third) of Trusts § 58 (2003), cmt. d(2).

21 ¹⁰ The Court correctly found that BOTW’s invocation of *B.F. Goodrich Co. v. Thrash*, 15 Wash. 2d 624 (1942) is
 22 misplaced. ECF 40 (ECF 40 at 7 n.3. As the Court noted, unlike here, the beneficiaries in *B.F. Goodrich* had no
 mechanism to demand distribution of trust assets, and the respondent (Thrash) had no vested interest in them. *Id.*

23 ¹¹ *Cle Elum Bowl, Inc. v. N. Pac. Ins. Co.*, 96 Wash. App. 698, 703, 981 P.2d 872, 875–76 (1999) (in interpreting a
 contract, “[i]f undefined, the terms must be given their plain and ordinary meaning.”).

24 ¹² If anything, the language of the Wills follows closely that of the term “incapacity” as defined under RCW
 25 11.88.010. *Compare* ECF 42 at 2 (whether individual “is incapable of managing to his or her own best interest and
 26 advantage the property to be distributed”), *with* RCW 11.88.010 (a “demonstrated *inability to adequately manage*
property or financial affairs”) (emphasis added). Meeting that standard has severe legal consequences under
 Washington law, including the appointment of a legal guardian. *See* RCW 11.88.010; *State v. Simms*, 95 Wash. App.
 910, 916 (1999).

1 college educated, has a home valued at \$5.8 million with her husband, who operates a luxury car
 2 dealership, and is the sole beneficiary of a trust called the SGB 2007 Trust that had \$13 million of
 3 assets, net of encumbrances, as of May 2017. ECF 5-34, Case No. 18-cv-243. She recently
 4 confirmed at her deposition that, among other things, that she (i) is in good health; (ii) belongs to
 5 several clubs, including the Bellevue Athletic Club, Overlake Golf Club and Seattle Yacht Club;
 6 (iii) continues to spend as many as 16 weeks of the year vacationing in Hawaii; (iv) sails with her
 7 husband annually to Canada; and (v) and has done extensive volunteer work. *See* Ex. 1 (Dep. Tr.)
 8 at 7:10-13; 9:19-25; 11:11-12:12; 20:2-7; 21:6-25; 25:8-16; 28:11-23.¹³ She was the trustee of her
 9 own trust before 2011. *See* Case No. 18-cv-243, ECF 1-5. Her approval has been required for
 10 Bingham family investments. Ex. 2 at 1. She had her mother convert her bank accounts to
 11 cashier's checks and then hide them in safety deposit boxes to avoid creditors, believing this was
 12 "the safest way to go." Ex. 1 at 103:7-19; 104:3-19; *see also* Ex. 3.

13 The "new" evidence BOTW contends supports a finding of "incapability" are simply artful
 14 and circuitous repetitions of the fact that Defendant has judgments entered against her, and she
 15 would prefer to continue to avoid complying with them. This includes: (i) the one paragraph of
 16 explanation in the redacted chart;¹⁴ (ii) the conclusory assertions in BOTW's declarations (to the
 17 extent these declarants have any lingering credibility after the Court's order); and (iii) the equally
 18 conclusory assertions of Henry Dean. *See* ECF 43, 44-45, 50. If anything, the "new" evidence
 19 **confirms** that BOTW has been complicit in Defendant's scheme to evade creditors—which is
 20 presumably why it chose to hide the evidence from LVB in the first place.

21 But just as a person cannot hinder, delay, or defraud creditors by transferring her property
 22 into a spendthrift trust, *see* RCW 19.40.041, a trustee cannot falsely designate a beneficiary as
 23 incapable of managing her assets and withhold distributions for the same purpose. *See* G. Bogert,

24
 25 ¹³ All citations in the form "Ex." are to the declaration of William R. Squires filed concurrently with this brief.

26 ¹⁴ *See* ECF 43 at 90 (finding "incapability" based on the existence of judgment creditors). The observation of Defendant's tax returns showing losses, and expenses exceeding income, obviously stem from those same judgments, and are simply repetitious for that reason.

1 *The Law Of Trusts And Trustees*, § 211 (2018 ed.) (“Trusts that have as their purpose delaying,
 2 hindering, or defrauding creditors are common examples of trusts with illegal purposes.”). “To
 3 hold otherwise would be to hand spendthrift trust beneficiaries an active sword for defrauding
 4 creditors against the public policy of this state.” *Erickson v. Bank of California, N.A.*, 97 Wash. 2d
 5 246, 253-54 (1982). BOTW and Defendant cannot, consistent with Washington law, cite evading
 6 creditors as a cognizable basis for a finding of “incapability.”

7 Indeed, the Court has already confirmed in its order in the related proceeding that “Plaintiff
 8 is entitled to seize any distributions made or hereafter distributed to Defendant and/or the SGB
 9 Trust from the Fisher Trusts.” Case No. 18-cv-243, ECF 182 at 12. This was not disputed in
 10 Defendant’s reconsideration motion, nor could it be. *Id.*, ECF 201. Given that undisputed reality,
 11 the only cognizable goal in declining to comply with the Wills, and distribute the funds, would be
 12 to evade creditors. Defendant’s husband has testified to a practice of timing other trust payments
 13 to ensure money is immediately transferred before it can be garnished. *See* Ex. 4 (Dep. Tr.) at 6:1-
 14 8, 9:5-11, 11:2-5, 29:21-30:7. The only effect of withholding the Fisher Trust funds would be to
 15 orchestrate a similar scheme should the Court’s freeze be lifted whereby BOTW and Defendant
 16 attempt to transfer away distributions before they can be garnished—forcing LVB and the Court to
 17 adjudicate an endless stream of fraudulent transfer claims for years to come.¹⁵

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court should deny BOTW and Defendant’s motions.
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24 ¹⁵ Defendant’s contempt for this Court’s rulings was most recently on full display when she admitted that immediately
 25 after the Court entered summary judgment regarding certain self-settled transfers in the related proceeding (Case No.
 26 18-cv-243, ECF 182), she and her counsel attempted to sell off the property that was the subject of the Court’s order in
 an effort to circumvent the Court’s ruling. *See id.*, ECF 216 at 5. Movants’ admission that by “incapability” they
 mean “evading creditors” is no more defensible, and certainly no basis for a finding that BOTW’s answer is sufficient.

1 DATED: January 14, 2019

2 s/ William R. Squires III
3 William R. Squires III, WSBA No. 4976
4 CORR CRONIN LLP
5 1001 Fourth Avenue, Suite 3900
6 Seattle, Washington 98154-1051
7 Telephone: (206) 625-8600 Fax: (206) 625-0900
8 E-mail: rsquires@corrchronin.com

9 *Attorneys for Plaintiff*

APPENDIX A – THE *IN CAMERA* EVIDENCE

Page Range¹	Summary of the Document	Previously Filed Publicly?	Category
9-28	First Codicil to Last Will and Testament of O.D. Fisher, dated June 17, 1961 .	Yes, ECF 5-1	Submitted for consideration with summary judgment papers; is not newly discovered evidence.
29-45	First Codicil to Law Will and Testament of Nellie Hughes Fisher, dated June 21, 1961 .	Yes, ECF 5-2	Submitted for consideration with summary judgment papers; is not newly discovered evidence.
46-50	Letter from Dale Foreman to Joseph Shickich re: O.D. Fisher and Nellie Hughes Fisher Trusts, dated February 2, 2016 .	Yes, ECF 33-1	Submitted to the Court before the judgment; is not newly discovered evidence; simply parrots legal theories that could have been presented if they were legitimate.
51-56	Email from Cicilia Park to Andrew Brown (BOTW) re: BOTW – FPG/Shari Trust, dated June 9, 2017 .	Yes, ECF 5-11	Submitted for consideration with summary judgment papers; is not newly discovered evidence; confirms “incapability” finding is motivated by evading creditors.
57-81	Request for Discretionary Distribution submitted to BOTW by Sharon Bingham, dated August 8, 2017 , and supporting documentation.	No	Is not newly discovered evidence (dated August 8, 2017); previously produced by SGB 2007 Trustee.
81-85	News article, “BiB Spotlight: Deals burn Fisher heirs’ fortune,” dated September 2011 .	No	Is not newly discovered evidence (dated September 2011); is a public record.
86	Death Certificate of Frances Bingham, dated May 24, 2017 .	No	Is not newly discovered evidence (dated May 24, 2017); is a public record.
87-92	Meeting Minutes from BOTW’s October 23, 2017 Discretionary Oversight Committee Meeting.	No	Is not newly discovered evidence (dated October 23, 2017); confirms “incapability” finding is motivated by evading creditors.

¹ BOTW attached the same 86 pages of exhibits to two different declarations. *Compare* ECF 43, *with* ECF 44. The page range references herein are specific to ECF 43.

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Nathan J Arnold
JOHNSTON JACOBOWITZ & ARNOLD, PC
2701 First Ave., Suite 340
Seattle, WA 98121
Telephone: (206) 866-3230
Email: nathan@jjalaw.com

Attorney for Defendant Sharon Bingham

David Ryan Ebel
M. John Way
SCHWABE WILLIAMSON & WYATT
1420 5th Ave., Suite 3400
Seattle, WA 98101-4010
Telephone: (206) 407-1525
Email: debel@schwabe.com
Email: mjway@schwabe.com

Eleanor A DuBay
TOMASI SALYER MARTIN
121 SW Morrison St., Suite 1850
Portland, OR 97204
Telephone: (503) 894-9900
Email: edubay@tomasilegal.com

Attorneys for Defendant Bank of the West

/s/ William R. Squires III

William R. Squires III, WSBA No. 4976
Attorney for Plaintiff
CORR CRONIN LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Telephone: (206) 625-8600
Fax: (206) 625-0900
Email: rsquires@corrchronin.com